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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 265

JACK COAST, PETITIONER

vs.

HUNT OIL COMPANY AND OHIO OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Jack Coast, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 10, 1952, rehearing denied May 15, 1952.

OPINIONS BELOW

The opinion and supplemental opinion of the District Court (R. 44-58)[1] are reported in 96 F. Supp. 53. The opinion of the United States Court of Appeals for the fifth Circuit (R. 63) is reported in 195 F. (2d) 870.

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[1] Record references are to the printed record.

JURISDICTION

A judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 10, 1952 (R. 67) and a rehearing was denied on May 15, 1952 (R. 78). The jurisdiction of this Court is invoked under Act of Congress of June 25, 1948, c. 646, 62 Stat. 928 (28 U.S.C. § 1254 (1).

STATUTES INVOLVED

15 U.S.C. 1

"Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices

on any commodity herein, involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court." July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

15 U.S.C. 2

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the Court." July 2, 1890, c. 647, § 2, 26 Stat. 209.

15 U.S.C. 15

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustain-

ed, and the cost of the suit, including a reasonable attorney's fee." Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

15 U.S.C. 16

"A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken.

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof." Oct. 15, 1914, c. 323, § 5, 38 Stat. 731.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 17 (b)

"*Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law

under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appoined by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., § § 754 and 959 (a)."

Rule 19 (a)

"*Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs, or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff."

QUESTIONS PRESENTED

1.

Is the petitioner, Jack Coast, a "person" who has been "injured in his business or property" within the meaning of the anti-trust laws (15 U.S.C., Sec. 15)?

2.

If it is held that petitioner is not a "person" who has been "injured in his business or property" and that the action must be brought by the partnership, Coast Oil Company, does not the partnership itself have capacity to

sue on a claim being asserted as "a substantive right existing under the . . . laws of the United States" despite the local law of the state of the domicile of the partners (Rule 17 (b) of the Federal Rules of Civil Procedure)?

3.

If it is held that petitioner is not a "person" who has been "injured in his business or property" and that the action must be brought by the partnership, Coast Oil Company, appearing through its sole and only partners, the petitioner and Justin R. Querbes, who has refused to join the action; would joining Querbes as a party defendant under Rule 19 (a) of the Federal Rules of Civil Procedure oust the Federal District Court of jurisdiction?

STATEMENT OF THE CASE

Petitioner Jack Coast, a resident of Caddo Parish, Louisiana, filed a complaint in the United States District Court for the Western District of Louisiana under the anti-trust laws of the United States seeking damages against Hunt Oil Company, a Texas corporation, and Ohio Oil Company, an Ohio corporation (R. 1). Petitioner alleged that these two companies and others monopolized and controlled all production, refining and marketing of petroleum products produced from the Cotton Valley Oil Field of Webster Parish, Louisiana. Petitioner stated that he owned an undivided 49% interest in a certain refinery in the Cotton Valley Field, which refinery was operated under the name of Coast Oil Company and that he was entitled to and had received, since March, 1943,

49% of the profits derived from its operation. Petitioner itemized the total damages attributed to the defendants' monopolistic practices but alleged that he was entitled to only 49% of the total damages which, under the law, should be increased threefold.

The respondents, Hunt Oil Company and Ohio Oil Company, obtained an extension of time for pleading (R. 10) and thereafter filed separate motions to dismiss the complaint, to strike certain allegations therefrom, for a more definite statement, and further enlargement of time for answer if the motions were denied (R. 11 and 25).

After these motions were filed petitioner filed an amended complaint as a matter of course under Rule 15 (a) of the Federal Rules of Civil Procedure (R. 33) setting forth that Coast Oil Company was a commercial partnership organized under the laws of Louisiana, domiciled in Caddo Parish, and that Justin R. Querbes, a resident of Caddo Parish, Louisiana, owned the remaining 51% of the refinery and that Querbes received 51% of the profits derived from its operation. (The Articles of Partnership appear in the Record at page 41). Petitioner stated that he was the managing partner of Coast Oil Company by virtue of the Articles of Partnership and that he devoted his entire time to the operation of the refinery, while Justin R. Querbes was not engaged in the operation of the refinery but was principally employed in other large business ventures. Petitioner further alleged that Justin R. Querbes had refused to join him in bringing the action,

either in his own behalf or on behalf of the partnership, Coast Oil Company.

In this same pleading (R. 35) petitioner further prayed that by leave of Court he be allowed to amend his original petition so as to add the following new paragraphs, to-wit:

"26.

"In the first alternative this claim is brough by Coast Oil Company for Jack Coast and for his use and benefit.

"27.

"In the second alternative this claim is brought by Coast Oil Company for Jack Coast and for his use and benefit and for the purpose of this alternative claim, Justin R. Querbes is made a party defendant (except, however, that the demand for judgment for damages is not made against him).

"28.

"In the third alternative this claim is brought by Coast Oil Company, by Jack Coast, managing partner, and for the purposes of this alternative claim the amount of damages asserted is 100% of the damages caused in the operation of the refinery as set forth in paragraph 21 of the complaint, or $2,784,803.19, and the judgment demanded is for threefold that amount or $8,354,409.57, plus a reasonable attorney's fee.

"29.

"In the fourth alternative this claim is brought by Coast Oil Company, appearing through Jack Coast and Justin R. Querbes, and for this purpose making Justin R. Querbes a party defendant (except, however, that the demand for judgment for damages is not made against him); and for the purposes of this alternative claim the amount of damages asserted is 100% of the damages caused in the operation of the refinery as set forth in paragraph 21 of the complaint, or $2,784,803.19, and the judgment demanded is for threefold that amount of $8,354,409.57, plus a reasonable attorney's fee.

"30.

"In the fifth alternative it is alleged that Justin R. Querbes should be made a party defendant (except, however, that the demand for judgment for damages is not made against him) for the purposes of the claim asserted by plaintiff Jack Coast in his own right against Hunt Oil Company and The Ohio Oil Company.

"31.

"In the sixth alternative this claim is brought by Jack Coast and Justin R. Querbes, who for the purposes of this alternative claim is made a party defendant (except, however, that the demand for judgment for damages is not made against him),

> and for the purposes of this alternative claim the amount of damages asserted is 100% of the damages caused in the operation of the refinery as set forth in paragraph 21 of the complaint, or $2,784,803.19, and the judgment demanded is for threefold that amount or $8,354,409.57, in the proportions of 49% to Jack Coast and 51% to Justin R. Querbes, plus a reasonable attorney's fee."

The District Court refused to allow the amendments and sustained the motions of the respondents to dismiss for failure to state a cause of action upon which relief could be granted. In its original opinion the District Court held that the plaintiff, Jack Coast, had no cause of action on the matters complained of for the reason that he had not been injured "in his business or property", and that the cause of action was that of a partnership, Coast Oil Company, of which Jack Coast and Justin R. Querbes were partners. It held that in Louisiana a suit on a partnership claim must be brought in the name of the partnership appearing through each and every one of its partners, but that joining Justin R. Querbes as a party defendant to the suit under the authority of Rule 19 (a) of the Federal Rules of Civil Procedure "would deprive this Court of jurisdiction, since according to the allegations both he and plaintiff are citizens of Louisiana". (R. 56). In a supplemental opinion the District Court stated "Generally speaking, of course, where the action is for the enforcement of rights arising under or created by a federal statute such as the Anti-Trust Act, the Court has jurisdiction re-

gardless of the citizenship of the parties; and all incidental and ancillary questions, even though they involve a state law, can and should be disposed of, if otherwise the case is brought by one having a right or standing to do so." (R. 59). The Court then held that Querbes (whom it had held was necessary to the action) could not be joined as a defendant under Rule 19 (a) of the Federal Rules of Civil Procedure since the plaintiff alone had no standing to bring the action, and he could not join Querbes as a defendant since "the other defendants have no interest in this controversy between the two partners, and to that extent it would be between citizens of this state alone, and in which the Court would be without jurisdiction". (R. 59).

On appeal to the United States Court of Appeals for the Fifth Circuit the opinion and judgment of the District Court was affirmed.

SPECIFICATION OF ERRORS

The following errors in the opinion and decision of the United States Court of Appeals for the Fifth Circuit are specified.

1.

In holding that Jack Coast is not a "person" who in his own right has a cause of action under the anti-trust laws of the United States.

(a) In holding that Jack Coast was not injured in his business;

(b) In failing to hold that he was injured in his property.

2.

In holding that Jack Coast as managing partner of Coast Oil Company could not bring the action on behalf of the partnership as provided in Rule 17 (b) Federal Rules of Civil Procedure.

3.

In denying petitioner's motion for leave to amend in the respects requested to make Justin R. Querbes a party defendant under authority of Rule 19 (a) Federal Rules of Civil Procedure.

(a) In holding that the joining of Querbes would oust the Court of jurisdiction because it would destroy diversity of citizenship;

(b) In holding that Querbes could not be joined as a party defendant because the petitioner, Jack Coast, did not have a cause of action in his own right;

(c) In holding that Querbes could not be joined as a party defendant because one partner cannot sue another.

REASONS FOR GRANTING THE WRIT

1.

The Court of Appeals has decided several important questions of Federal laws which have not been but should be settled by this Court. The first such question arises under the Act of Congress quoted above (15 U.S.C., Section 15), which specifically grants to "any person who

shall be injured in his business or property by reason of anything forbidden in the anti-trust laws" the right to sue for damages in the Federal courts.

The allegations of the complaint, which are taken as true for purposes of a motion to dismiss for failure to state a cause of action, set forth the following facts: Petitiner has at all times since March 30, 1943, been engaged in the operation of a refinery in the Cotton Valley Field of Webster Parish, Louisiana; the refinery is real estate and the petitioner owns 49% of the physical real estate; petitioner is entitled to 49% of the profits in the operation of the refinery; petitioner is the managing partner of the refinery under the Articles of Partnership and is obligated to devote his entire time to its operation; Justin R. Querbes owns the remaining 51% of the refinery and is entitled to 51% of the profits but Querbes is not engaged in operating the refinery but, in fact, devotes his time to an entirely different business; Querbes has refused to join in this action with petitioner; and the complaint describes in detail the conditions existing in the Cotton Valley Field brought about by the monopolistic practices of the respondents which caused a shut-down of the refinery on September 1, 1945, and have seriously curtailed its operations since that date.

Petitioner asserts that he is a "person" who has been "injured in his business or property" under the anti-trust laws and that the decision of the Court below is in conflict with applicable decisions of this Court. In the case of *Atlantic v. Chattanooga Foundry and Pipeworks, et al.*

127 Fed. 23, Affirmed 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241, this Court held that the City of Atlanta is a "person" within the meaning of the anti-trust laws. In reaching this conclusion the Court approved the opinion of the United States Court of Appeals for the Sixth Circuit, wherein that Court stated:

> "Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act give the remedy to 'any person' injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act.' If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by enhancing the value of a commodity when the subject of interstate commerce, it had the power to give a compensatory remedy to any person directly affected by the unlawful agreement." *City of Atlanta v. Chattanooga Foundry and Pipeworks, et al, 127 Fed.* 23 at page 27.

The foregoing statement clearly and correctly sets forth the broad purpose and intent of the anti-trust laws. A similar statement appears in the case of *Mandeville Island Farms, Inc. v. American Crystal Sugar Company,* 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328, where it was stated:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to

> sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *American Tobacco Co. v. United States*, 328 U. S. 781. The Act is comprehensive in its terms and coverage, *protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.* Cf. *United States v. South-Eastern Underwriters Assn., supra*, at 553." (Emphasis supplied).

The Court of Appeals for the Fifth Circuit has given a restrictive interpretation to the anti-trust statutes and has violated the intent of those laws in holding that Jack Coast is not a "person" who has been injured in his business or property. The *Atlanta* and *Mandeville Island Farms, Inc.* cases, supra, are illustrative of the comprehensive protection given persons under the anti-trust laws. To say that Jack Coast is not protected is to lose sight of the evils which the Act was passed to alleviate.

The holding of the United States Court of Appeals in this case also conflicts with the language and import of the case of *Roseland v. Phister Mfg. Co.*, 125 F. 2d 417, rendered by the Court of Appeals for the Seventh Circuit. That case dealt with a complaint of a salesman of fire prevention equipment under the anti-trust laws against three defendant manufacturers of this equipment. The defendants moved to dismiss the complaint on the grounds that the business described was not a business within the meaning of the Act. The Court stated:

"The language of the statute is general and all in clusive. It includes any person who shall be injured in his business or property. We assume that the word business was used in its ordinary sense and with its usual connotations. It signifies ordinarily that which habitually busies, or engages, time, attention or labor, as a principal serious concern or interest. In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention, and labor of men for the purpose of livelihood or profit, - persistent human efforts which have for their end pecuniary reward. It denotes 'the employment or occupation in which a person is engaged to procure a living'. Allen v. Commonwealth, 188 Mass. 59, 74 N.E. 287, 288, 69 L.R.A. 599."

* * * *

"* * *. His (the plaintiff's) position is that he is one who has for sometime engaged in the activity of an exclusive sales agent, making it his calling, representing his employer, possessing an exclusive territory of several states and having an established clientele in the various communities thereof.

"*Such a business, says the defendants, is that of themselves and not that of plaintiff.* We cannot agree. The Act is penal so far as criminal liability is concerned but is remedial in so far as it creates a remedy for damages. City of Atlanta v. Chattanooga Foundry & Pipe Co., C.C., 101 F. 900. * * * Consequently, accepting the words of Congress at their face value, we think the complaint sufficient. True, plaintiff is not a competitor of the offending parties, but he has been engaged in the vocation of general sales agent for a number of years, built up

a clientele, acquired knowledge of their conditions, their buying power and other relevant characteristics. He has busied himself with the sales of defendants' products as a means of livelihood - the selling of merchandise by him under exclusive sales contracts constitutes his business. *We may not by what seems to us a strained and unjustified limitation bar plaintiff from the statutory remedy.* Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law'. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241." (Emphasis supplied).

Another case directly in point is *McWhirter v. Monroe Calculating Machine Co., Inc.*, (D.C., W.D. Mo. 1948) 76 Sup. 456. The plaintiff, suing under the Act here involved, was the manager of a local district of Marchant Calculating Machine Co. His compensation was based on 35% of the sale price of each sale made through his district. He brought this action against the defendant to recover damages sustained as a result of alleged violations of Section 13 of Title 15. The defendant contended that the plaintiff could not maintain the action; that Section 15 was not applicable to the manager of a company who received his compensation on a commission basis. The Court held:

"It is alleged that the defendant discriminated between purchasers of commodities of like grade and

> quality in that he granted to some who were not entitled thereto a 10 percent discount, which was refused to others similarly situated; that it was done for the purpose of preventing competition - and creating a monopoly; *and that as a result thereof this plaintiff, as manager of a competing company and who received his compensation through commissions, was prevented from making sales and was thereby damaged.* I think the plaintiff comes within the provision of the Act and is entitled to maintain his action. Roseland v. Phister Mfg. Co., 7 Cir., 125 F. 2d 417, 139 A.L.R. 1013; Midland Oil Co. v. Sinclair Refining Co., D.C. 41 F. Supp. 436." (Emphasis supplied).

In the instant case the United States Court of Appeals, following the District Court, has concluded that the "person" injured by the defendants is not Jack Coast, an individual, but the partnership, Coast Oil Company, composed of only two partners, Coast and Querbes. Querbes has refused to sue either individually or on behalf of the partnership. The Court of Appeals has held that Jack Coast cannot sue, citing Louisiana cases which hold that on debts due a partnership the partnership must assert the claim as a partnership, appearing through all of its partners (R. 64).

Petitioner does not question the jurisprudience of Louisiana where sums are due a partnership on obligations to the partnership, but petitioner here asserts that the anti-trust laws have given to *him* personally a right of action for injury to his business and property which *he* may enforce for *his own* protection. The United States Court

of Appeals has confused the right to sue on partnership obligations with the right given this petitioner as an individual and all others in the same category who have been injured by activities prohibited by the anti-trust laws.

It is undisputed that Coast is in the business of operating a refinery in the Cotton Valley Field; that he is the manager of the refinery; and that he obtains his livelihood from the operation of his business. There is no escape from the conclusion that Jack Coast as an individual has been injured in his business - the business of operating the refinery.

Coast has likewise been injured in his property. Under the law of Louisiana the refinery is an immovable or real estate. *Buchler v. Fourroux*, 193 La. 445, 190 So. 640. Under the well established jurisprudence of Louisiana a commercial partnership as such cannot own real estate since real estate acquired by commercial partnerships vests title in the partners as joint owners and does not vest title in the partnership entity. *Skillman v. Purnell, et al*, 3 La. 494; *Thomas v. Scott*, 3 Rob. 256; *Hollingsworth v. Atkins Brothers*, 46 La. Ann. 515, 15 So. 77. Either partner in a commercial partnership can sell his interest in the real estate. *Willey v. Carter*, 4 La. Ann. 56; *John Calder and Co. et al. v. Their Creditors*, 47 La. Ann. 346. Jack Coast owns 49% of the real estate, and the value of this property has been materially affected by the actions of the defendants. The plain language of the anti-trust laws gives Jack Coast the right to recover for any damages he can establish to his property.

This case presents a vital question involving the interpretation of the basic right of a person to sue for damages under the anti-trust laws of the United States and so far as can be found no case has come before any Federal Court dealing with the exact facts which confront the petitioner here.

In the opinion of the District Court the Judge stated "No case involving the rights of individual partners to sue on behalf of the partnership for damages under the Federal anti-trust statutes has been found, . . ." (R. 55). The question presented in this litigation is important throughout the Federal system and the meaning of the law which states "any person who shall be injured in his business or property . . . may sue therefor . . ." will continue to be obscure and the subject of diverse opinions until this Court has defined and made certain the words of the law which insure to small business men the right to engage in business without the oppressive restraint of unlawful combinations.

2.

Even if it is held that petitioner is not a person who has been injured in his business or property he is the managing partner of Coast Oil Company under the Articles of Partnership and can bring the action on behalf of the partnership despite the local law of the state of the domicile of the partners, because the cause of action is "a substantive right existing under the . . . laws of the United States" (Rule 17 (b) Federal Rules of Civil Procedure).

To arrive at the conclusion that petitioner cannot bring this action the District Court and Court of Appeals have held in effect: (1) That Jack Coast is not a "person" who has been "injured in his business or property"; (2) that the cause of action under the anti-trust laws belongs to Coast Oil Company, a partnership, and not to Jack Coast; and (3) that the only way the partnership can sue is through each and every one of its partners. (R. 64). The Court of Appeals stated "We think the cause of action is vested in the partnership, a distinct legal entity under Louisiana law." (R. 65).

Purporting to follow the Louisiana jurisprudence, the District Court and the Court of Appeals have held that the partnership itself must be a party plaintiff and the only way the partnership can become a party plaintiff is for each and every partner to join in the suit (R. 54 and 65). The following illustration sets forth the holding of the Courts below: If the X-Y Company is a Louisiana partnership composed of X and Y, residents of Louisiana, then any suit on behalf of X-Y Company must be brought in the following style: "The complaint of X individually and Y individually and the X-Y Company, a partnership composed of X and Y, the sole and only partners thereof, with respect shows the Court, etc." The Courts below reach this conclusion after examining the frequently repeated statements in Louisiana jurisprudence that a partnership is a legal entity. (R. 54 and 64).

In spite of the statements in the jurisprudence of Louisiana the entity theory of partnerships is hollow and

meaningless terminology in light of the further jurisprudence of the state to the effect that the only way the entity can come into Court is through each and every partner. *Wolfe v. New Orleans Tailor Made Pants Co.*, 52 La. Ann. 1357, 27 So. 893, quoted at length in the opinion of the District Court (R. 50) and cited in the opinion of the Court of Appeals (R. 65). Louisiana gives lip service to an entity theory of partnerships in words only and the true position of partnerships in Louisiana is no different from that in common law jurisdictions. In both Louisiana and in common law jurisdictions each and every partner must be a party plaintiff in order to properly engage the partnership in litigation. This conclusion has been thoroughly analyzed in the most comprehensive study of Louisiana partnership law which has been made wherein the author stated:

> "The conclusion seems unavoidable that Louisiana's entity theory has not resulted in practices which differentiate Louisiana law from law in other states. In the first place, many states have adopted entity ideas which even verbally are not much different from the entity concept Louisiana borrowed from the French commentators. But more significant, this section has shown that many of the supposed differences between the aggregate and entity theories are purely verbal." (F. Hodge O'Neal "An Appraisal of the Louisiana Law of Partnership", IX La. Law Review, 307 at page 472.)

The background of the Louisiana law has been related to set forth the very important question presented

in this case under Rule 17 (b) of the Federal Rules of Civil Procedure. Rule 17 (b) states:

> "*Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., § § 754 and 959 (a)."

It has been pointed out in several authorities that Rule 17(b) was adopted to allow a partnership or unincorporated association to sue and be sued as an entity in the Federal Courts where a federal right is involved for the purpose of removing the impracticable and burdensome restriction of the common law which required all members of the partnership to be joined as plaintiffs or defendants where a federal right is involved. One of the leading cases on this subject is *United Mine Workers of America v. Coronado Coal Company*, 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975. In *2 Barron and Holtzoff Federal Practice and Procedure* at page 32 it is stated:

"Among the case in which the enforcement of federal substantive rights has been held to justify actions by or against such associations regardless of the state law are actions under the Fair Labor Standards Act, [7] the National Labor Relations Act,[8] Labor Management Citations Act,[9] and Sherman Anti-Trust Acts,[10] the patent laws,[11] the price control statutes,[12] the War Labor Disputes Act, [13] and actions involving constitutional rights.[14]

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7 A Missouri voluntary, co-operative, mutual association could be sued in Federal District Court under Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq., notwithstanding that under laws of Missouri associations could not be sued as an entity. Schmidt v. People Telephone Union of Maryville, Mo., C.C.A. 8th, 1943, 138 F. 2d 13.

Under the Fair Labor Standards Act of 1938, 29 U.S.C.A. § § 203 (a), 216 (b), and Rules, unincorporated associations which act as employers may be sued in their own names in both federal and state courts. Williams v. United Mine Workers of America, 1943, 172 S.W. 2d 202, 204 Ky. 520, 149 A.L.R. 505.

8 Textile Workers Union of America v. Amazon Cotton Mill Co., D.C.N.C. 1947, 76 F. Supp. 159, reversed on other grounds, Amazon Cotton Mill Co. v. Textile Workers Union of America, C.C.A. 4th, 1948, 167 F. 2d 183.

9 Congress, having created a substantive right of management or labor to sue to enforce a collective bargaining contract in an industry affecting interstate commerce in the exercise of its power under the commerce clause, U.S.C.A. Const. Art. 1, § 8, Cl. 3, may also provide procedure for enforcing that right by making voluntary labor organizations legal entities for purpose of suit. Wilson & Co. v. United Packinghouse Workers of America, D.C.N.Y. 1949, 83 F. Supp. 162.

10 A labor union having substantive rights existing under Sherman Anti-Trust Act, 15 U.S.C.A. § § 1-7, 15 note or National Labor Relations Act 29 U.S.C.A. § 151 et seq. has capacity to bring a suit in federal court to enforce such rights, though it is an unincorporated association having no capacity to sue under law of state in which such court is held. United Brick & Clay Workers of America v. Robinson Clay Product Co., D.C. Ohio 1946, 64 F. Supp. 872.

11 Under this rule, unincorporated voluntary association of railroad companies could be sued in its common name for alleged infringement of patents. Sperry Products v. Association of American Railroads, D.C.N.Y. 1942, 44 F. Supp. 660, reversed on other grounds 132 F. 2d 408, 145 A.L.R. 694, certiorari 63 S. Ct. 1031, 2 cases, 319 U.S. 744, 87 L. Ed. 1700.

After discussing *United Mine Workers of America v. Coronado Coal Company*, supra, Professor Moore states "Rule 17(b) very properly extends the holding of that case to the converse situation, and authorizes a partnership or other unincorporated association to *sue* as an entity for the purpose of enforcing a federal substantive right". *3 Moore's Federal Practice*, 2nd Ed., Section 17.25, page 1409.

In the instant case Jack Coast is the managing partner which power was given him by the Articles of Partnership (R. 43). The cause of action herein sued upon is a substantive right arising under the law of the

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A patent infringement suit may be brought in the name of a partnership. Gregory v. Royal Typewriter Co., D.C.N.Y. 1939, 27 F. Supp. 160.

12 In action under price control statutes, process against partnership under its partnership name and service on one of partners bring the partnership and partnership assets before the court. Bowles v. Marx Hide & Tallow Co., D.C.Ky. 1945, 4 F.R.D. 297.

Contra, in a dictum which did not cite Rule 17, Bowles v. Brazman, D.C. Mo. 1945, 4 F.R.D. 318.

13 An unincorporated union is suable as an entity for the purpose of enforcing against it a federal substantive right under the War Labor Disputes Act, 50 U.S.C.A. App. § § 309, 1501-1511. Thermoid Co. v. United Rubber Workers of America, Local No. 83, .C.I.O., D.C.N.J. 1947, 70 F. Supp. 228.

14 A voluntary unincorporated association composed of negro teachers in the public schools of Norfolk was a "proper party" plaintiff in action for declaratory and injunctive relief from unconstitutional discrimination against colored school teachers in fixing of salaries. Alston v. School Board of City of Norfolk, C.C.A. 4th, 1940, 112 F. 2d 992, 130 A.L.R. 1506, certiorari denied 61 S. Ct. 75, 311 U.S. 693, 85 L. Ed. 448.

In action by unions and individual members thereof to enjoin state and municipal officials from violating rights of unions and members to picket during strike, the individual members, as citizens of the United States, were "proper parties", and the unions , being voluntary associations of individuals, were "proper parties" to conduct the suit in a representative capacity in the interest of their members. United Elec. Radio & Mach. Workers of America, CIO, v. Baldwin, D.C.Conn. 1946, 67 F. Supp. 235.

United States. Coast has sought to amend his petition so as to add Coast Oil Company as a party plaintiff within the meaning of Rule 17(b). (R. 35.) The proposed amendments have been refused in both the District Court and the Court of Appeals.

The District Court has held that Rule 17(b) is not applicable because under state law the partnership alone as an entity must sue and this can be accomplished only if each and every partner joins as a party plaintiff. The District Court has ignored Rule 17(b) and has not given any effect whatever to the right of a partnership to sue in its name *regardless* of state law when a federal substantive right is involved. The Court of Appeals has not specifically mentioned Rule 17(b) in its opinion but apparently that Court reached the same conclusion.

The uniform administration of the Federal Rules of Civil Procedure is of primary importance. The meaning and interpretation of Rule 17(b) has been the subject of frequent opinions by the District Courts and Courts of Appeal. No cases have been found involving the question raised here but in the many cases involving the rights of associations to sue and be sued it has been held in every instant that Rule 17(b) gives this right regardless of state law. *Schmidt v. People Telephone Union of Maryville, Mo.* (CCA 8, 138 F. (2d) 13; *Wilson and Company v. United Packing House Workers of America*, D.C. N. Y. 83 Fed. Supp. 162; *United Brick and Clay Workers of America v. Robinson Clay Products Company*, D. C. Ohio, 64 Fed. Supp. 872; and *United Mine Workers of America*

v. Coronado Coal Company, supra. The question is important in numerous cases where a federal right is involved, i. e. cases arising under the Fair Labor Standards Act, the National Labor Relations Act, Labor Management Citations Act, the patent laws, the price control statutes, the War Labor Disputes Act, the National Railway Labor Act, cases involving constitutional rights as well as anti-trust litigations.

3.

Even if it is assumed that petitioner Coast is not a person who has been injured in his business or property within the meaning of the anti-trust laws and that the cause of action belongs to Coast Oil Company, a partnership, and petitioner does not have the right to sue for the partnership under Rule 17(b), then the decision of the Court of Appeals is in error in denying the petitioner the right to amend his complaint under Rule 19(a) of the Federal Rules of Civil Procedure by making Justin R. Querbes and/or the entity, Coast Oil Company, parties defendant or involuntary plaintiffs.

The District Court refused to allow Querbes to be made a party defendant in the following language: "Joining Querbes as a hostile defendant would deprive this court of jurisdiction, since according to the allegations both he and plaintiff are citizens of Louisiana". (R. 56). This statement is obviously erroneous because jurisdiction is not based on diversity of citizenship but is grounded on the anti-trust laws. *General Investment Company v. New York Central Railroad Company*, 271 U. S. 228, 46 S. Ct.

496, 70 L. Ed. 920, and *Parker v. Brown*, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315.

In a supplemental opinion the District Court stated that it "would have no power to compel Querbes to join in the present suit" for the reason that "his [Coast] making Querbes a party is for the purpose of having the Court adjudicate that the latter should join in the demand for damages to the partnership, not withstanding his refusal to do so, and to that extent it is solely an issue between the two partners" and "the other defendants have no interest in this controversy between the two partners and to that extent it would be between two citizens of this state alone, and in which the court would be without jurisdiction". (R. 59).

On appeal the Court of Appeals also denied petitioner the right to make Querbes a party defendant for the purpose of causing the action to be maintained by the partnership under Rule 19(a) in the following manner: "The difficulty is that the plaintiff himself has no standing, joint or otherwise, to maintain this action. Rule 19(a), supra, relates to *joinder* of parties, it permits a plaintiff under proper circumstances to require another person or persons to *join* with him, but it makes no provision for a plaintiff to require another person to maintain an action vested solely in such other person, even though its maintenance might result in benefit to the plaintiff." (R. 66).

The statements of the District Court relative to Rule 19(a) were not commented upon by the Court of Appeals. There are numerous reasons why the District

Court was in error in its ruling. In the first place, no money judgment is sought by the plaintiff against Querbes. The proposed amendments to the original complaint specifically so state (R. 35-37). Joining Querbes as a defendant was requested on the grounds that he refused to join as a plaintiff under Rule 19(a) of the Federal Rules of Civil Procedure. This is a procedural and an equitable remedy as distinguished from an action at law. The purpose of joining the reluctant partner is not to obtain a money judgment against him but for the purpose of obtaining a judgment in behalf of the partnership or Coast against the real defendant that would be binding on the partner who refused to join in the action.

The provision of Rule 19(a) for making a person a defendant comes from Equity Rule 37 and from similar provisions which are common in state courts. It has been uniformly held in all jurisdictions in which the question has arisen that when one partner refused to join in a suit by the partnership to assert a partnership claim, that the reluctant partner may be made a party defendant.

Arkansas: *Ingram Lumber Company v. Ingersoll et al*, 93 Ark. 447, 125 S.W. 139.

California: *Nightingale v. Scannell*, 6 Calif. 506.

Indiana: *Hill v. Marsh*, 46 Ind. 218.

New York: *Freeman v. Abramson*, 61 NYS 839; *Baron v. Lakow*, 106 NYS 243.

Oklahoma: *Republic Supply Company v. Colbert*, 70 F. (2d) 586.

Texas: *Howell v. Bartlett*, 19 S. W. (2d) 104.

Washington: *Henson v. First Security & Loan Co.*, 2 P. (2d) 85.

Federal: *Edgell v. Felder*, 84 F. 69; *Charne v. Essex Chair Company, et al*, 92 F. Supp. 164, and cases cited therein.

After a thorough discussion of the matter in *Simkins Federal Practice*, 3rd Ed., Sec. 395, p. 346, the following conclusion is stated:

> "As a general rule, *partnership rights* and liabilities cannot be determined unless all the partners are parties to the suit, and they are *indispensable* parties But sometimes one member of a partnership may desire to file a suit in which the others refuse to join, in which case those who refuse to join must be made defendants.
>
> "Sometimes, also, it occurs that because of the citizenship of one or more of the partners the jurisdiction of the Federal Court would be ousted, and, being *indispensable* parties, they cannot be dismissed so as to give jurisdiction."

The rule in Louisiana is no different in substance from the rule obtaining generally in other jurisdictions. With the exception of cases involving federally created rights (Rule 17(b) Federal Rules of Civil Procedure), the general rule throughout the United States is that all of the partners must join in bringing a cause of action be-

longing to the partnership. 68 *C.J.S. Partnership*, Sec. 208, page 680. This is precisely the situation in Louisiana where all of the partners must join in bringing the cause of action in the name of the partnership. *Wolfe v. Now Orleans Tailor Made Pants Co.*, supra. Although the question has never arisen in Louisiana relative to the right to join a partner as a defendant who has refused to join as a plaintiff in asserting a partnership claim, it has been indicated that such could be done if the question were presented. *Pierce v. Robertson*, 190 La. 377, 182 So. 544; *Reed v. Warren*, 172 La. 1082, 136 So. 59.

Even if the question had arisen in Louisiana and Louisiana had decided the question contrary to every other jurisdiction where it has been decided such holding would be of no moment here. This case involves the enforcement of the cause of action granted by a federal statute and the right does not exist by virtue of any state law. A recovery under a federal statute "must be had in the mode and by and for the persons, and for the reasons, designated in the Act". *United States v. Klein, et al*, 153 F. (2d) 55 and 59. The question of joinder of parties under such circumstances is procedural and is to be determined under the Federal Rules of Civil Procedure and not by the decisions of any state. *2 Barron and Holtzoff, Federal Practice and Procedure*, page 57; *Moore's Federal Practice*, 2d Ed., pages 2152-3. In the case *Mutual Benefit Health and Accident Ass'n. v. Thomas*, 123 F. (2d) 353 at page 356 the Court stated:

> "We do not think the Court was at liberty to follow the practice of the state of Arkansas if that differed from that established by the rules of Civil Procedure."

The complaint in this case presents only the question of whether or not defendants are responsible in damages under the anti-trust laws of the United States. All other questions, such as joinder of parties are incidental to the question of liability under the anti-trust laws. Since only the Federal Courts have jurisdiction of that question they also have jurisdiction of all incidental questions that have or may arise in the case. *Hart v. Keith Exchange*, 262 U. S. 271, 43 Sup. Ct. 540, 67 L. Ed. 977; *United Fuel Gas Co. v. Railroad Commissioner of Ky.*, 278 U. S. 300, 49 Sup. Ct. 150, 73 L. Ed. 390; *Greene v. Louisville & I. R. Co.*, 244 U. S. 499, 37 Sup. Ct. 673, 6 L. Ed. 1280.

The statements made in the opinion of the Court of Appeals relative to joinder under Rule 19(a) are likewise in error. The Advisory Committee's Note on Rule 19 (a) states:

> "The first sentence with *verbal* differences (e. g., 'united' interest for 'joint interest') is to be found in Equity Rule 37 (Parties Generally - Intervention). Such compulsory joinder provisions are common."

Ohlinger's Federal Practice, Vol. 3, p. 309, in comparing the language from Equity Rule 37 - "Persons having a *united interest* must be joined on the same side as plaintiffs or defendants, but where anyone refuses to join,

he may for such reason be made a defendant." - with the language of Rule 19(a), F.R.C.P. states:

> "The change, under the present rule to 'persons having a joint interest' is noted by the Advisory Committee as a 'verbal' difference. It seems clear that the term must be given a nontechnical meaning which will correspond with the usage under the equity rule."

Hughes Federal Practice Jurisdiction & Procedure, Vol. 18, Sec. 21221, p. 32, points out that although Rule 19(a) applies to "joint owners of rights" in a technical sense, nevertheless "the provision is not confined to this restricted meaning".

Moore's Federal Practice, Second Edition, Vol. 3, page 2144, states in connection with Rule 19(a) that:

> "The phrase 'joint interest' is not to be given a technical meaning . . . The phrase must be construed to mean those who were necessary or indispensable parties under the previous practice."

The Courts below have held that since the interest of a partner in Louisiana in the claims or causes of action of a partnership is not technically speaking a "joint interest" that therefore the partners do not come within the meaning of Rule 19(a). It should be apparent that the term "joint interest" in the rule is not to be restricted to the technical meaning of "joint owners". The phrase means that persons have a "joint interest" when they are in such a relationship that their jounder is required in

asserting an action. That, in other words, they are indispensable parties. That is exactly what partners are in Louisiana - they are indispensable parties in asserting a claim of a partnership - the partnership claim can be asserted only *by* and *through* the partners even though it must be done in the partnership *name*.

The statement of the Court of Appeals that "The difficulty is that the plaintiff himself has no standing, joint or otherwise, to maintain this action" is simply incorrect. (R. 66). The plaintiff along with his partner Querbes has a joint standing to bring this action - they and they alone can bring the action. Though the action is brought in the name of a partnership - it can only be brought by the two partners in that name and no one else can bring the action. They are the indispensable parties to such an action in the fullest sense.

In every other jurisdiction in the United States in which the question has arisen, including the two cases from other Courts of Appeal mentioned above, it has been held that when one partner refuses to join in bringing a suit to enforce a claim belonging to a partnership that the reluctant partner may be joined as a defendant for the purpose of asserting the cause of action belonging to the partnership. These holdings are made on the basis of the code provisions that were the basis of Equity Rule 37 and in turn Rule 19(a) of the Federal Rules of Civil Procedure. The instant case whereby Coast has been denied this right is the only case ever to arise in either the Federal or the State Courts of the United States in so far as the available

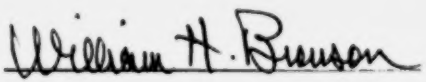
citators and digests disclose where the contrary result has been reached. Rule 19(a) should not be given a technical meaning and therefore confined to "joint owners" in a technical sense. There is no basis for a distinction between the jurisprudence of Louisiana and any other jurisdiction.

Not only are the Courts below in error in reaching this decision but important federal questions have been decided contrary to all authority which petitioner has been able to locate. The supervisory jurisdiction of this Court is invoked to correct the errors below and make uniform the decisions of the lower courts on the important and frequently litigated subject of Rule 19(a).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 265

JACK COAST, *Petitioner*,

v.

HUNT OIL COMPANY AND THE OHIO OIL COMPANY,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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JACK COAST, *Petitioner*,

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HUNT OIL COMPANY AND THE OHIO OIL COMPANY,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Statement of the Case

This action was brought by Petitioner, Jack Coast, in the United States District Court for the Western District of Louisiana under the antitrust laws of the United States for an alleged violation of such laws by the Respondents, Hunt Oil Company and The Ohio Oil Company.

In his complaint, Petitioner alleged in substance that he owned in his own right an undivided forty-nine per cent

(49%) interest in a refinery operated under the name of "Coast Oil Company" and sought to recover treble the amount of forty-nine per cent of the refinery's loss of profits caused by the Respondents' alleged violations of the antitrust laws (R. 1-9).

The Respondents, Hunt Oil Company and The Ohio Oil Company, each filed a motion to dismiss Petitioner's complaint for failure to state a claim upon which relief could be granted on the ground that Petitioner, Jack Coast, was not the real party in interest, in that the refinery in which Petitioner had an interest was operated by Coast Oil Company, a partnership composed of Petitioner and Justin R. Querbes, and if any cause of action existed, such action belonged to the partnership as an entity and could only be asserted by the partnership (R. 11-30).

After the Respondents' motions had been filed and argued, but prior to a decision thereon by the District Court, Petitioner filed (1) an amendment of the complaint as a matter of course, wherein Petitioner set forth further details concerning the partnership, Coast Oil Company, and (2) a motion for leave to amend the complaint to set up various alternative claims for relief and for the purpose of some of such alternative claims, Petitioner proposed to make his partner, Querbes, a party defendant to the suit (R. 33-37).

The District Court granted the motions of Respondents to dismiss Petitioner's complaint for failure to state a claim upon which relief could be granted (R. 44-60). Upon appeal, the judgment of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit (R. 63-67). The opinions of the District Court and the Court of Appeals are reported in 96 F. Supp. 53 and 195 F. 2d 870, respectively.

Both of the Courts below held that under the law of Louisiana, a partnership is an entity entirely separate and distinct from the partners composing it; that the cause of action, if any, attempted to be asserted in this case was vested solely in the partnership because the damages attempted to be recovered consisted of an alleged loss of profits which belonged exclusively to the partnership entity; that the Petitioner, Jack Coast, had not alleged any injury to his business or property and had no interest in the cause of action or any right to assert the same on behalf of the partnership; and that the compulsory joinder of his unwilling partner, Justin R. Querbes, could not be accomplished under Rule 19(a) of the FEDERAL RULES OF CIVIL PROCEDURE since neither Coast nor Querbes had any interest, joint or otherwise, in the partnership claim (R. 44-59, 63-66). The Court of Appeals further pointed out that there was no allegation in the complaint that Querbes was guilty of any fraud or misconduct or, except by inference, that he was even unwise in refusing to consent to the bringing of the action by the partnership, and that no grounds were shown for the Court to interfere with the management of the partnership entity or to authorize the suit to be maintained in its behalf, either by a receiver or by one of the partners (R. 66).

Petitioner has filed in this Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and is contending that the Court of Appeals erred (1) in holding that Jack Coast is not a person who in his own right has a cause of action under the antitrust laws; (2) in holding that Jack Coast as managing partner of Coast Oil Company could not bring the action on behalf of the partnership; and (3) in denying Petitioner's motion for leave to amend in the respects requested to make Justin R. Querbes a party defendant.

ARGUMENT

I.

The Court of Appeals correctly held that Jack Coast had no cause of action under the antitrust laws because the damages sought were for loss of profits in the business of the partnership, Coast Oil Company, and the cause of action, if any, was vested in the partnership, a distinct legal entity under the substantive law of Louisiana.

Petitioner's first specification of error in his Petition for a Writ of Certiorari is in substance that the Court of Appeals erred in holding that Petitioner is not a "person" who in his own right has a cause of action under the antitrust laws of the United States (P. B. 11). Petitioner cites ATLANTA v. CHATTANOOGA FOUNDRY AND PIPE WORKS ET AL., 127 Fed. 23, affirmed 203 U.S. 390, 51 L. Ed. 241, wherein this Court held that the City of Atlanta is a "person" within the meaning of the antitrust laws and MANDEVILLE ISLANDS FORMS, INC. v. AMERICAN CRYSTAL SUGAR COMPANY, 334 U.S. 219, 92 L. Ed. 1328, in which this Court held that a seller, as distinguished from a purchaser, was a "person" within the meaning of the antitrust laws (P. B. 13-15). Such cases are clearly inapplicable to the instant case. The Court of Appeals did not hold that the Jack Coast is not a "person" within the meaning of the antitrust laws. Instead the Court of Appeals held that the complaint failed to allege any injury to the business or property of Jack Coast (R. 65).

As was pointed out by the Court of Appeals, the only damages which Petitioner alleges or seeks to recover in this action are for treble the amount of profits allegedly lost by the partnership, Coast Oil Company, in the operation of

a refinery in the Cotton Valley Field, Webster Parish, Louisiana (R. 65). The Articles of Partnership reveal that the Coast Oil Company was formed by Coast and Querbes "for the sole purpose of operating that * * * refinery * * * and engaging in the sale and distribution of the products of that operation" (R. 41).

The opinions of the District Court and the Court of Appeals establish conclusively that under the substantive law of Louisiana the partnership, when formed, became a distinct legal entity separate from the partners who compose it. It is the sole owner of the partnership business and claims, and it alone may sue to enforce such claims (R. 49, 64). Accordingly, the loss of profits in the operation of the refinery which Petitioner seeks to recover could only constitute an injury to the partnership business, as distinguished from an injury to Petitioner's business or property. Petitioner, therefore, is not the real party in interest. His suit is analogous to a suit under the antitrust laws by a stockholder or officer of a corporation to recover for injuries to the corporate business. The Federal Courts have repeatedly held that such an action cannot be maintained because injuries to a corporate entity do not constitute an injury to the individual stockholders or officers. GERLI v. SILK ASSOCIATION OF AMERICA, 36 F. 2d 959 (D.C.S.D.N.Y., 1929); AMES v. AMERICAN TELEPHONE AND TELEGRAPH CO., 166 F. 820, (C.C.D., Mass. 1909); LOEB v. EASTMAN KODAK CO., 183 F. 704, (3rd C.A., 1910); WESTMORELAND ASBESTOS CO., INC. v. JOHNS MANVILLE CORPORATION ET AL., 30 F. Supp. 390 (D.C.S.D. N.Y., 1939).

The above authorities are controlling in this case. Petitioner, having failed to allege facts to show that he has personally suffered an injury in his business or property, has failed to state a cause of action under the antitrust laws. The Court of Appeals, in affirming the action of the Dis-

trict Court dismissing Petitioner's Complaint in this case, stated:

> "Assuming for the purposes of this decision that the complaint alleged a violation of the antitrust laws and consequent damage, that damage consists of loss of profits in the partnership business and we think the cause of action is vested in the partnership, a distinct legal entity under Louisiana law. The district court, we think, has correctly distinguished the cases upon which the appellant relies, 96 F. S. 53, at page 60.
>
> "Appellant makes the further contention that, even if it be held that the cause of action for injury to the business was vested in the partnership, that the complaint alleges an injury to the property of the plaintiff because it alleges that, 'Plaintiff in his own right owns an undivided forty-nine (49%) per cent interest in the refinery * * * By virtue of his ownership of forty-nine (49%) per cent of the profits from his operation of it.' We think that the damages sought to be recovered are not for injuries to the refinery itself but for loss of profits which allegedly would have been made from the partnership business of operating the refinery, and that the consequent injuries to the physical properties are too remote to give rise to a separate cause of action." (R. 65)

Petitioner further contends that the holding of the Court of Appeals conflicts with the cases of ROSELAND v. PHISTER MANUFACTURING COMPANY, 125 F. 2d 417 (7th C.A.) and MCWHIRTER v. MONROE CALCULATING MACHINE COMPANY, INC., 76 F. Supp. 456 (D.C.W.D. Mo., 1948). As the Court of Appeals pointed out, both of such cases were clearly distinguished by the District Court as follows:

> "Plaintiff has also cited other cases, such as Roseland v. Phister Mfg. Co., 124 F. 2d 417, and McWhirter v. Monroe Calculating Machine Co., Inc., 76 F. Supp.

> 456, in support of his contention that by the fact of his being managing partner of the Coast Oil Company he has a separate interest or business entitling him to bring this suit in his own name. However, those are cases where the plaintiffs operated as agents or salesmen on a commission basis, whose earnings therefrom were their own, constituted their livelihood and were directly affected by the illegal acts of the defendants. Here, all of plaintiff's efforts and activities, whether as manager or otherwise, were for the partnership, and any profits or income arising therefrom were the property of the partnership, while complainant's interest herein is residuary and could be realized only after the payment of expenses and debts of the firm. See *Gerli v. Silk Assn. of America,* 36 F. 2d 959, and authorities cited therein." (R. 58)

Moreover, in the case of ROSELAND v. PHISTER MFG. CO., 125 F. 2d 417, relied upon by Petitioner, the 7th Court of Appeals specifically recognized that in a case such as this there can be no recovery under the antitrust laws where the plaintiff's only business is the business of the entity in which he holds office or owns an interest. This Court stated:

> "Ordinarily persons who may claim injury to their business under the Act do not include a stockholder making claim for injury or damage to the business of his corporation, *Corey v. Independent Ice Co.*, D.C., 207 F. 459; *Gerli v. Silk Assn. of America, et al,* 36 F. 2d 959, a creditor suing to recover damages to his debtor's business, *Noyes v. Parsons, et al.*, 9 Cir. 245 F. 689, or an officer or director suing to recover for injury to the business of the corporation."

II.

Under the provisions of Rule 17(b) of the *Federal Rules of Civil Procedure*, the capacity of Petitioner to bring an action for the partnership, Coast Oil Com-

pany, must be determined by the law of the State of Louisiana.

Petitioner's second specification of error is that the Court of Appeals erred in holding that Jack Coast, as managing partner of Coast Oil Company, could not bring this action on behalf of the partnership as provided in Rule 17(b) of the FEDERAL RULES OF CIVIL PROCEDURE (P. B. 12). Petitioner argues that since a Federal substantive right is involved, he may sue for the partnership regardless of the State law (P. B. 20). This contention is refuted in the express provisions of Rule 17(b), which are as follows:

> "The capacity of an individual, other than one acting in a representative capacity, to sue and be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held,* except (1) that a partnership or other unincorporated association, *which has no such capacity by the law of such state,* may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States and (2) that the capacity of a receiver appointed by a court of the United States is governed by Title 28, USC, §§ 754 and 959(a)."
> (Emphasis ours).

Clearly, the provisions of Rule 17(b) upon which Petitioner relies relate only to a partnership or other unincorporated association which has no capacity to sue or be sued by the law of the State in which the District Court is held. In this case, as was pointed out by both the District Court and the Court of Appeals, the partnership entity does have capacity to sue in the State of Louisiana, when appearing

through and represented by all of the partners composing the partnership (R. 54, 65). Therefore, Petitioner's arguments concerning Rule 17(b) are obviously inapplicable. Further, such arguments have been resolved by this Court contrary to Petitioner's contentions.

In BUSBY v. ELECTRIC UTILITIES EMPLOYEES UNIT, 323 U.S. 72, 74, 89 L. Ed. 79 (1944), this Court in commenting upon Rules 17(b) and 81(e) of the FEDERAL RULES OF CIVIL PROCEDURE stated:

> "Under these Rules, a plaintiff may proceed in the District Court for the District of Columbia against an unincorporated labor union in its common name if, by the law of the District, it has capacity to be sued as such. *Only if it be decided that by the local law such a union does not have capacity to be sued in its own name need there be consideration of the second part of Rule 17(b),* which permits a suit against an unincorporated association for the enforcement of 'a substantive right existing under the Constitution or laws of the United States.' " (Emphasis ours).

Since under the law of Louisiana a partnership has the capacity to sue, the only question presented is whether one partner has the capacity to bring an action on behalf of the partnership. Under the express provisions of Rule 17(b) of the FEDERAL RULES OF CIVIL PROCEDURE, this question must be determined by the law of the State of Louisiana where the suit was brought and the cause of action arose. The opinions of the Courts below and the Louisiana authorities cited therein establish conclusively that Petitioner has no such capacity under the Louisiana law (R. 49-54, 64). The law of Louisiana in this respect is not unique. In UNITED COPPER SECURITIES COMPANY v. AMALGAMATED COPPER COMPANY, 244 U.S. 261, 263, 61 L. Ed. 1119 (1917), sev-

eral stockholders of the United Copper Company brought an action under the antitrust laws to recover damages sustained by the United Copper Company by reason of an alleged violation of the antitrust laws. In such suit the plaintiff stockholders joined the United Copper Company as a party defendant after alleging that it had refused to bring the suit. This Court, in affirming the action of the District Court dismissing the complaint on a demurrer, stated:

> "There is no statement in the complaint that the alleged wrongful acts have caused injury to the plaintiffs as individual shareholders; and no recovery is sought for damages to them or to their property. The case involves, therefore, this single question; whether a stockholder in a corporation which is alleged to have a cause of action in damages against others for conduct in violation of the Sherman Act may sue at law to recover such damages in the right of the corporation if, after request, it refuses to institute the suit itself? Insuperable obstacles to the maintenance of the action are presented both by the substantive law and by the law of procedure."
>
> * * *
>
> "But even if the circumstances were such as to justify individual stockholders in seeking the aid of the court to enforce rights of the corporation, it is clear that their remedy is not at law. The particular equitable relief sought in Fleitmann v. Welsbach Co., 240 U.S. 27, 60 L. Ed. 505, 36 Sup. Ct. Rep. 233, was denied; but this denial affords no reason for assuming that the long-settled rule under which stockholders may seek such relief only in a court of equity will be departed from because the cause of action involved arises under the Sherman Law."

III.

The granting of the motion of Jack Coast for leave

to amend to make his partner, Justin R. Querbes, a party defendant would have availed Coast nothing.

Petitioner's third and last specification of error is that the Court of Appeals erred in denying Petitioner's motion for leave to amend in the respects requested to make Justin R. Querbes a party defendant under Rule 19(a) of the FEDERAL RULES OF CIVIL PROCEDURE (P.B. 12). In this connection, the Court of Appeals held as follows:

> "Appellant insists however that under Rule 19(a), F. R. C. P., he has the right to make the partnership an involuntary plaintiff or to make Querbes a party defendant for the purpose of causing the action to be maintained by the partnership. The difficulty is that the plaintiff himself has no standing, joint or otherwise, to maintain this action. Rule 19(a), supra, relates to joinder of parties, it permits a plaintiff under proper circumstances to require another person or persons to join with him, but it makes no provision for a plaintiff to require another person to maintain an action vested solely in such other person, even though its maintenance might result in benefit to the plaintiff. In speaking of the application of this rule as to joinder of a party as 'involuntary plaintiff', Professor Moore says, 'The doctrine can properly be applied only where there is such a relationship that the absent party must allow the use of his name as plaintiff', 3 Moore's Federal Practice (2nd ed.) page 2149." (R. 66)

Petitioner contends that in other jurisdictions in which the question has arisen a partner who refuses to join in a suit, may be made a party defendant. Petitioner cites cases from Arkansas, California, Indiana, New York, Oklahoma, Texas, and Washington, and Federal cases arising in the States of Georgia and New Jersey (P.B. 29, 30). The fallacy

in Petitioner's contention in this respect is that, unlike the State of Louisiana, none of such States is a civil law State, and under the law of each of such States, the partners have an interest in the cause of action. For example, in the Arkansas case cited by Petitioner (INGRAM LUMBER COMPANY v. INGERSOLL & Co., 125 S.W. 139 (Ark. S. Ct. 1910), the Court stated:

> "All the partners had an interest in the subject-matter of the suit and, accordingly, were proper and necessary parties to the action."

In California, the Supreme Court, in the case of REED, ET AL., v. INDUSTRIAL ACCIDENT COMMISSION, 73 P. 2d 1212, 1213, stated:

> "The underlying fallacy in respondent's argument is the assumption that the partnership is a distinct unit, separate from the members thereof. Occasional suggestions of this 'entity' theory of partnership are found in statutes or decisions, but, apart from exceptional situations, a partnership is not considered an entity, but an association of individuals."

In Indiana, in the case of LEWIS, ET AL., v. JOSEPH HARTLEY & SONS, 83 N.E. 2d 438, 440 (App. Ct. 1949), the Court stated:

> "There is no statute in Indiana authorizing actions on Partnership obligations against a partnership as a separate legal entity, and an action to enforce partnership liabilities must be brought against the individual partners.
>
> "The common law does not recognize a partnership as a legal entity distinct from and independent of the persons composing it."

In New York, Judge Learned Hand in ROOSMORE v. COMMISSIONER OF INTERNAL REVENUE, 76 F. 2d 520, 521 (2nd C.A., 1935), announced the law of New York as follows:

> "But our law has never adopted the civil law theory of the firm as a juristic entity; the Uniform Partnership Law as little as any other. That statute recognized the partners as co-owners ('tenants in partnership') of the 'specific' firm property, Section 51 N.Y. Partnership Law."

In Oklahoma, in the case of REPUBLIC SUPPLY COMPANY v. COLBERT, 75 F. 2d 586, 588 (10th Ct. Ap. 1934) cited by Petitioner, the Court said:

> "An obligation owing to a partnership is joint."

In Texas, the Commission of Appeals in ALLISON v. CAMPBELL, 1 S.W. 2d 866, 867, stated:

> "A partnership at common law is not a legal entity but a contractual status. * * * Texas has no statute regulating general partnerships, in the absence of which the rules of common law govern the courts in dealing with the question of general partnership."

In Washington, in HENSON v. FIRST SECURITY AND LOAN COMPANY, 2 P. 2d 85, 86 (Wash. Sup. Ct. 1931), the Washington case relied upon by Petitioner, it was held as follows:

> "* * * it is within the implied power of a partner to institute ordinary legal proceedings in behalf of a firm by using the names of all the parties as such as plaintiffs for the enforcement of the rights of the firm."

In Georgia, in the case of HEWITT v. BROWN, 29 S.E. 2d 326, 328 (Ct. Ap. 1944), the Court held:

> "Under the laws of this State a partnership is not a being distinct from the members who compose it."

In CHARNE v. ESSEX CHAIR COMPANY, ET AL., 92 F. Supp. 164 (D. C. N. J. 1950), the Federal case from New Jersey relied upon by Petitioner, the Court said:

> "Under the Uniform Partnership Act, § 25, in effect in both New Jersey and Pennsylvania, N. J. S. A. 42; 1-25, 59 P. S. § 72, a partner's interest in partnership assets is that of a co-owner. The absent partner's interest would therefore seem to be a joint interest within the meaning of Rule 19(a) such as would be directly affected legally by the adjudication."

Under the civil law of the State of Louisiana, on the other hand, a partnership is recognized as a distinct legal entity. It is the sole owner of the partnership claims, and it alone may sue on such claims. The substantive law of Louisiana with respect to partnerships is stated by the Louisiana Supreme Court in the early case of SUCCESSION OF PILCHER, 1 So. 929, 932 (1887) as follows:

> "In Smith v. McMicken, 3 La. Ann. 322, the Court said: 'The partnership, once formed and put into action, becomes, in contemplation of law, a moral being, distinct from the persons who compose it. It is a civil person which has its peculiar rights and attributes. * * * Hence, therefore, the partners are not the owners of the partnership property. The ideal being, thus recognized by a fiction of law, is the owner; it has the right to control and administer the property to enable it to fulfill its legal duties and obligations; and the respective parties who associated themselves for the purpose of participating in the profits which may accrue, are not owners of the property itself, but of the residuum which may be left from the entire partnership property, after

the obligations of the partnership are discharged.' City of New Orleans v. Gauthreaux, 32 La. Ann. 1128."

It is clear from the foregoing case and the authorities which have followed it that under Louisiana law the partners in a Louisiana partnership have no interest, joint, united, or otherwise, in the partnership property or claims. E. B. HAYES MACHINERY COMPANY v. EASTHAM, ET AL., 84 So. 898 (La. S. Ct. 1920); WOLF v. NEW ORLEANS TAILOR-MADE PANTS COMPANY, 27 So. 893 (La. S. Ct. 1900); TROPOLI v. PAULSON, ET AL., 30 So. 2d 370 (La. S. Ct. 1948); ESTEVE BROS. & COMPANY v. HARRELL, 272 F. 382 (5th C. A. 1921); and HENDERSON'S ESTATE v. COMMISSIONER OF INTERNAL REVENUE, 155 F. 2d 310 (5th C. A. 1946).

Therefore, the provisions of Rule 19(a) of the FEDERAL RULES OF CIVIL PROCEDURE, which relate to the joinder of persons "having a joint interest" in the claim attempted to be asserted are clearly inapplicable to this case where the Petitioner, Jack Coast, who has no interest in the claim, has attempted to join his partner, Justin R. Querbes, who also has no interest for the purpose of asserting a claim belonging solely to the distinct and separate partnership entity.

Moreover, the joinder of Petitioner's partner, Querbes, as a hostile defendant would not remedy the failure of the complaint to state a cause of action. It is well settled in Louisiana that the mere joinder of all of the partners is not sufficient to state a cause of action upon a partnership claim. Instead, the suit must be brought by the partnership entity acting by and through all of the partners in their capacity as partners and as collectively representing and bringing the partnership into Court.

In E. B. HAYES MACHINERY COMPANY v. EASTHAM ET AL., 84 So. 898, 899 (La. S. Ct., 1920), the Court said:

> "So long as the partnership is not dissolved, it alone can maintain an action on the firm's claims, and *even though all its members join therein, such a suit cannot be maintained in the absence of the partnership as a party plaintiff.*" (Emphasis ours.)

In WOLF v. NEW ORLEANS TAILOR-MADE PANTS COMPANY, 27 So. 893 (Louisiana S. Ct., 1900), all of the partners appeared as plaintiffs in the suit and made reference in their pleadings to the fact that they were "conducting a commercial business in the City of New Orleans under the firm name of 'B. J. Wolf & Sons.' " However, the Louisiana Supreme Court held that these allegations were not sufficient to enable the individual partners to maintain a suit on a claim owned by the partnership, stating:

> "Plaintiffs' pleadings show affirmatively that they were associated together, conducting a commercial business under a firm name. Resulting from that fact, followed the creation of a commercial partnership with a firm name. It was an entity, for the purpose of rights and obligations, of suits and of judgments for and against it, differing from the individuals creating and composing it. Suits in its favor should be brought as a partnership, in the firm name, and as appearing through and represented by all of the partners composing the partnership; their full names and residence being set out in the petition. Plaintiffs recite the fact that they were conducting a commercial business under the firm name of B. J. Wolf & Co., but they do not declare that in appearing in the suit they do so in their capacities as partners of the partnership, and as collectively representing and bringing the partnership into court."

In this case the complaint affirmatively alleges that Querbes, the owner of 51% of the partnership, "has refused to consent to or join in the bringing of such an action as

this in behalf of Coast Oil Company." (R. 34). The joinder of Querbes as a hostile defendant obviously could not change the fact that he has refused to consent to the suit being brought by the partnership. Therefore, even if he could be made to appear as a defendant, such compulsory and unwilling appearance would not constitute an appearance of the partnership entity because the firm still would not be represented by and acting through all of the partners in their capacities as partners and as collectively bringing the partnership into Court in the manner required by the above cited Louisiana authorities.

As has been noted above, Rule 17(b) of the FEDERAL RULES OF CIVIL PROCEDURE requires that the capacity of the Petitioner to sue must be determined by the law of Louisiana. The opinion of the Court of Appeals establishes beyond dispute that under such Louisiana law, the Petitioner has no capacity, either individually or by the compulsory joinder of his partner, Querbes, to bring this action by or for the partnership. Obviously, therefore, the attempted joinder of Querbes was improper and would have availed Petitioner nothing. Having failed to state a cause of action by the real party in interest in the manner required by the controlling substantive law of the State of Louisiana, the complaint was properly dismissed.

Conclusion

For the reasons hereinabove set forth, it is respectfully submitted that the Petition for Writ of Certiorari should be denied. The decision of the Court of Appeals is based upon and in conformity with the substantive law of Louisiana as established by the Supreme Court of that State. The decision is not in conflict with any decision of another Circuit Court of Appeals or of this Court, but on the con-

trary, is in harmony with the applicable decisions of other Circuit Courts of Appeals and this Court.

Respectfully submitted,

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 265

JACK COAST, PETITIONER

vs.

HUNT OIL COMPANY AND OHIO OIL COMPANY

REPLY BRIEF ON BEHALF OF JACK COAST IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY BRIEF ON BEHALF OF JACK COAST IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondents, Hunt Oil Company and Ohio Oil Company, have filed a brief in opposition to the petition for a writ of certiorari and have sought to minimize the importance of the federal questions raised in the petition by attempting to show that the decision of the Court of Appeals for the Fifth Circuit rests entirely upon the correct application of narrow principles of Louisiana partnership law which do not have universal importance.

Such is not the case, and a careful examination of these contentions reveals their subordinate importance to questions of federal law of wide-spread application as

well as the inapplicability of the Louisiana law which has been urged. Certain principles of Louisiana law are involved in a proper determination of this case. However, they are incidental to the major issues which concern interpretation and application of the anti-trust laws (particularly 15 U.S.C. Sec. 15), and Rules 17(b) and 19(a) of the Federal Rules of Civil Procedure. Each of these questions was presented in the original petition, but the respondents have made arguments in their reply brief and have raised various defenses which require additional consideration to reveal their inapplicability to this case.

The three major questions in this case need no repetition since a rereading of the original petition, together with the arguments, will readily reveal their substance. In their reply, the respondents have urged the following propositions, which will be taken up in order:

(1) That petitioner is not a "person" protected by the anti-trust laws because his position is analogous to a stockholder in a corporation; because he personally has not been injured in his "business or property"; and because he is not "the real party in interest."

(2) That petitioner cannot avail himself of Rule 17(b) of the Federal Rules of Civil Procedure because, under Louisiana law, the partnership, Coast Oil Company, has the capacity to sue.

(3) That the motion of petitioner to make his partner, Querbes, a party defendant under Rule 19(a), Federal Rules of Civil Procedure, should be denied be-

cause it is governed by Louisiana law and, even if granted, would have availed Coast nothing.

1.

Petitioner is a person protected by the anti-trust laws and his position is not analogous to a stockholder in a corporation. Petitioner has been personally injured in his business and property and he is the real party in interest.

In the respondents' brief (R. B. 5)[1] it is stated that petitioner's suit is analogous to a suit under the anti-trust laws by a stockholder of a corporation to recover for injury to the corporate business caused by activity in violation of the anti-trust laws. The cases relied upon by the respondents (R. B. 5) were also cited in the opinion of the Court of Appeals (R. 65)[2]. The respondents' effort to draw an analogy between the plaintiff in this litigation and stockholders' derivative suits breaks down upon careful scrutiny of the reasons advanced in the decisions in the cases which they cite, and also as soon as the distinctions between a corporation and a partnership are examined.

Justice Holmes issued a warning against the confusion of these superficially similar concepts in these words:

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1. The symbol R. B. is used herein to designate references to respondents' brief.

2. Record references are to the printed record.

"We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But from the point of view of the law there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts. Therefore, when a paid-up share in a corporation is taken, no liability is assumed, apart from statute, but simply a right equal in value to a corresponding share in the assets and good will of the concern after its debts are paid. If the right is worth something it is a proper security, and if it is worth nothing no harm is done. It is true that a statute may add a liability, but when, as usual, this is limited to the par value of the stock, it has not been considered to affect the nature of the share so fundamentally as to prevent a national bank from taking it in pledge, with qualifications, as it might take land or bonds.

"But to take a share by transfer on the books means to become a member of the concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation, and his rights with regard to the corporate property are incident to his position as such. *National Bank v. Case, 99 U.S. 628, 631; Pullman vs. Upton, 96 U.S. 328.* This does not matter, or matters less, in the case of a corporation, for the reasons which we have stated. But when a similar transfer is made of a share in a partnership it means that the transferee at once becomes a mem-

ber of the firm and goes into its business with an unlimited personal liability, in short, does precisely what a national bank has no authority to do." *Merchants' National Bank of Cincinnati v. Wehrmann, 202 U.S. 295, p. 300, 26 S. Ct. 613, 50 L. Ed. 1036.*

A partner's position is therefore different from that of a stockholder in a number of important particulars: First, commercial partners in Louisiana are bound in solido for the debts of the partnership, Louisiana Civil Code, Art. 2872. This is also generally true throughout the United States. *1 Fletcher, Cyclopedia of the Law of Private Corporations, p. 48* Any loss or damage to the partnership is a direct damage to each individual partner since each is fully and personally liable for *all* of the partnership obligations. In the case of a corporation, a stockholder can only lose the capital investment which he has made.

Secondly, the partner is in a different position from the stockholder for the reason that the stockholder has surrendered the operation and control of the business to a board of directors, and the affairs of the business are conducted through the board. In a partnership no such surrender of control to a board of directors, representing a distinct entity, has taken place. Under the law of Louisiana, "The partners are supposed to have given, reciprocally, to each other the power of administering one for the other. What one does is valid, even for the share of his partners, without receiving their approbation . . ." Louisiana Civil Code, Art. 2870. A managing partner

may act for the partnership "without the assent of the other partners and contrary to their prohibition . . ." Louisiana Civil Code, Art. 2867. In Louisiana the individual partners have not surrendered their right to act to some entity; whereas, in the case of an incorporated entity, the corporation represents the individual stockholders. The very fact that Louisiana procedure requires a suit on a partnership claim to be brought in the name of the partnership by each and every one of the partners is significant of the extent to which partnership remains "the sum total of the individuals" under Louisiana law. *1 McMahon, Louisiana Practice, pp. 164, 165.* The fact that a partnership is not always a legal entity has been pronounced by the Louisiana Supreme Court in *Drews v. Williams, 50 La. Ann. 579, at page 584, 23 So. 897.* There the court stated:

> "In our view, the rights and liabilities of the members of the plaintiff commercial partnership were the same as the rights and liabilities of the partnership in matters of the trespass alleged. *The injunction addressed to one of the partners had the effect of enjoining the partnership.* If it had the effect of enjoining one of the members of the commercial partnership, it necessarily enjoined both. The decisions to which our attention was invited do not establish a rule applying in every case involving partnership rights and liabilities. *We are not of opinion that always, and in every case, the firm is a legal entity, separate and distinct from its members, as contended by the defendant.* From Lindley on Partnership (Am. Ed., p. 6) we quote: 'With partnerships the case is otherwise. The members of these do not form a collective whole, distinct from

> the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually. "Si quid societati debetur singulis debetur et quod debet societas singuli debent." ' " (Emphasis supplied)

Finally, ownership of immovables purchased by a commercial partnership is vested in the partners as joint owners rather than in a partnership entity, and title is even registered in the individual names of all partners. In the case of corporations, real property is owned by the corporate entity (see page 19 of the petition for certiorari where this principle was discussed and cases cited). Either partner in a commercial partnership can sell his interest in the real estate. A stockholder cannot sell any interest in corporate real estate.

In the cases cited by respondents, i. e., *Gerli v. Silk Association of America, 36 F. 2d. 959; Ames v. American Telephone and Telegraph Co., 166 F. 820; Loeb v. Eastman Kodak Co., 183 F. 704; Westmoreland Asbestos Co., Inc. v. Johns Manville Corporation et al, 30 F. Supp. 390,* (R. B. 5), a number of reasons were advanced to deny a stockholder the right to sue individually for wrongs done to the corporation. These reasons may be summarized as follows:

1. The injury to a stockholder is indirect, remote, and consequential;
2. The presence of other remedies;

3. Management of the corporation is vested in a board of directors, and, in the absence of fraud or mismanagement, the discretion of the board should not be interfered with; and

4. A multiplicity of suits would result if a stockholder could bring the action.

In the present case the damage to Coast is not indirect, remote, and consequential. He is a joint owner of the property itself. He is liable to the full extent of all of his property wherever situated for all of the obligations and debts of the partnership. The respondents have stated that petitioner, Coast, is not the real party in interest, and that he, personally, has suffered no injury to his business or property (R. B. 5). It is obvious that Coast has suffered a real, direct, and personal injury if the facts of the petition are true. Anyone placed in the position of this plaintiff could not conclude otherwise.

In the case of *Loeb v. Eastman Kodak Co., supra,* the court pointed out that plaintiff had other remedies. The court stated that the plaintiff could have sued the trustee in bankruptcy for an order directing the trustee to bring suit on behalf of the bankrupt corporation, upon the stockholder putting up security for costs. In *Ames v. American Telephone and Telegraph Co., supra,* the court stated that the plaintiff there had a like remedy. In *Westmoreland Asbestos Co., Inc. v. Johns Manville Corporation et al, supra,* the corporation was also a party plaintiff, and, therefore, when the individual stockholder was dismissed, no harm resulted. In the present litigation, the

only other remedy which the lower courts have even indicated is that Coast could first sue his partner, Querbes, for a dissolution of the partnership, and then bring the action. It has not been shown, however, how Coast would be in any different or better position to bring the suit after that costly and injurious step. If Coast began a suit after dissolution, the respondents would undoubtedly claim that the cause of action had been split. Even if Coast had the funds to buy Querbes' partnership interest, it would likely be advanced that he had purchased a litigious right.

Management of the partnership affairs has not been surrendered to a board of directors. Coast is actually the managing partner under the articles of partnership, and, under the Louisiana law hereinabove mentioned, a managing partner may act for the partnership without the assent of the other partners and contrary to their prohibition. The doctrine of multiplicity of suits has not even been argued by the respondents, although it is mentioned in the cases cited by them. When persons injure others through their wrongful acts, they are responsible in damages to each and every person whom they injure and cannot force all of the injured parties to sue in one action. If Coast has himself, personally, been injured, he has a right to sue irrespective of injury to others.

The cases *Atlanta v. Chattanooga Foundry & Pipeworks et al, 127 F. 23, affirmed 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241*, and *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328*, decided by this court, illustrate the broad cover-

age contemplated by the anti-trust laws. These cases show that the word "person" is not to be given a restrictive meaning but is to be given a construction which will effectuate the purpose of the anti-trust laws, that is, the protection of all who are injured by unfair practices or combinations violating the substantive provisions of the law.

2.

If the partnership, Coast Oil Company, as such, has no capacity to sue under Louisiana law, the suit may be brought in the name of the partnership under Rule 17(b), Federal Rules of Civil Procedure, since a federal substantive right is involved.

Rule 17(b), Federal Rules of Civil Procedure, allows a partnership to sue in its common name where a federal substantive right is involved and the partnership has no capacity as such to sue in its common name under state law. There is no question relative to the existence here of a federal substantive right, but respondents contend that the partnership entity has the capacity to sue in Louisiana because certain Louisiana cases must be followed which hold that all partners must join in a suit, in their individual capacities and in the name of the firm, to recover on partnership debts. According to the argument made by the respondents, the only possible way in which a Louisiana partnership can bring suit is for each and every partner to be before the court as a party plaintiff. Under this very contention, how can it be said that capacity

exists in the partnership, as such, and yet every partner must join?

In *United Mine Workers of America et al v. Coronado Coal Company et al, 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975*, the contention was made that the United Mine Workers had capacity to be sued only by joining and suing each of its members and that, because such capacity existed, a suit against the entity could not be effected. This court specifically overruled that contention and allowed suit without joining every member. In the many cases since the *United Mine Workers* case, which cases are cited at pages 24 and 25 of the petition for certiorari, even though the partnership or association could have sued or been sued by joining each and every member, this was not required in any case where a federal right was involved. The construction of Rule 17(b) which has been advanced by the respondents would make that rule utterly useless. It has always been held, even under the common law, that partnerships and associations could sue and be sued if all members were joined. In that sense they have always had capacity. Rule 17(b) has for its specific purpose the elimination of the joining of all parties. For litigation purposes, the partnership may sue and be sued "as an entity for the purpose of enforcing a federal substantive right." *3 Moore's Federal Practice, 2d. Edition, Sec. 17.25, page 1409.*

Busby v. Electric Utilities Employees Unit, 323 U.S. 72, 65 S. Ct. 142, 89 L. Ed. 78, cited by respondents (R. B. 9), merely states the rule of 17(b). The case of *United Copper Securities Company v. Amalgamated Cop-*

per Company, 244 U.S. 261, 37 S. Ct. 509, 61 L. Ed. 1119, cited by respondents (R. B. 9) to show the inapplicability of Rule 17(b), is itself completely foreign to any discussion relative to that rule because that case deals with a stockholder attempting to bring a suit in the corporate name. Rule 17(b) does not even purport to deal with corporations.

The powers of Jack Coast, the petitioner, as the managing partner, have been mentioned heretofore in this brief and also in the original petition. According to the citations of authorities from Louisiana law contained both in the respondents' brief and in the decisons of both lower courts, a Louisiana partnership in effect has no capacity, as such, to bring any suit so long as the requirement is made that all partners be joined prior to the bringing of the suit. The requirement of joinder of all partners deprives the partnership of capacity and thereby brings the case directly within the terms of Rule 17(b), which authorizes a suit on behalf of a partnership, as such, when capacity is denied the partnership, as such, by state law.

3.

The motion of petitioner to make Justin R. Querbes a party to the suit under Rule 19(a), Federal Rules of Civil Procedure, should be allowed. The motion is not governed by Louisiana law, and, if granted, all parties would be before the court.

In the petition for certiorari, a number of cases were cited from other jurisdictions which have allowed a partner to sue on a partnership claim and join the partners

as hostile plaintiffs who have refused to bring the suit. The respondents state that the cases cited by petitioner at pages 29 and 30 of the petition for certiorari are distinguishable and inapplicable to this litigation because under the civil law of Louisiana a partnership is a distinct legal entity, whereas the cases cited by petitioner arose in common law jurisdiction where the partners have "an interest in the cause of action" (R. B. 12).

This attempted distinction is a play on words only. In none of the cases cited by petitioner was it held that one partner could sue separately. It was specifically stated that all of the partners were necessary parties to the suit, and a hostile partner was made a party to the suit involuntarily so that a judgment would be binding on all parties. The case of *Ingram Lumber Company v. Ingersoll et al, 93 Ark. 447, 125 S.W. 139*, is typical of the remainder of the cases. The court stated:

> "The claim herein sued on grew out of a contract made with the partnership and therefore was a partnership asset. All parties . . . were . . . necessary parties to the action . . . . where one partner is unwilling to join in a suit to enforce a partnership claim, the other co-partners have a right to use his name upon indemnifying him against loss, if indemnity is demanded . . . ., and in its sound discretion the court has the right to prevent dismissal of a suit by one partner where it appears that the dismissal will result in an injury to the other partners." *125 S.W. 139, at page 141.*

In that case, the court specifically held that the suit could not be prosecuted without all partners being before the

court, but the holding of the court did not leave the partner remediless who brought the suit.

Again, in *Henson v. First Security and Loan Company, 2 Pac. 2d. 85, at page 86*, the court stated:

> ". . . Henson is a party plaintiff, that is, a member of the partnership, and made such a party by his partner under the general rule of law that it is within the implied power of a partner to institute ordinary legal proceedings in behalf of a firm by using the names of all the parties as such as plaintiffs for the enforcement of the rights of the firm."

The cases cited by the respondents, *Read et al v. Industrial Accident Commission, 73 Pac. 2d. 1212; Lewis et al v. Joseph Hartley & Sons, 83 N.E. 2d. 438; Roosmore v. Commissioner of Internal Revenue, 76 F. 2d. 520; Allison v. Campbell, 1 S.W. 2d. 866;* and *Hewitt v. Brown, 29 S.E. 2d. 326*, are in no way in conflict with the cases cited by petitioner since none of those cases involve the precise question as to whether or not a hostile partner can be joined against his will to assert a partnership claim.

As was stated in the petition for certiorari (p. 22), there is no difference between the Louisiana entity theory of partnerships and the common law theory since in both jurisdictions each and every partner must be a party to the suit to assert a partnership claim. The result is the same in both jurisdictions and the cases cannot be distinguished on the basis of an entity theory.

Respondents state "that under Louisiana law the partners in a Louisiana partnership have no interest,

joint, united, or otherwise, in the partnership property or claims" (R. B. 15). This statement is simply incorrect. In the petition for certiorari (p. 19), Louisiana authorities have already been cited which hold that the individual partners are joint owners of partnership real estate and each can sell his portion. Moreover, under the very cases cited by the respondents, it has been held that when the partners all join individually and as partners, they may recover in a suit for partnership claims; their interest is united and joint. The partnership has no being separate from the actions of its partners.

The respondents have also asserted that even if Querbes is joined in this action, it would not remedy the failure of the complainant to state a cause of action because the entity, Coast Oil Company, would still not be a party to the suit. The petitioner included six alternative demands in his amended complaint (R. 35, 36, and 37). Under paragraphs 27, 29, and 31 of the amended complaint, Coast Oil Company is a party to the action. The entity, Coast Oil Company, as respondents refer to it, has no ability to join itself in the action since it is an intellectual concept which can only act through one or both of its partners. There is no one else who can be joined, yet respondents say this is still insufficient, and that since Querbes has originally withheld his consent to join in the suit, his appearance as a hostile plaintiff would not cure the defect. Respondents state: "The firm still would not be represented by and acting through all of the partners in their capacities as partners and as collectively

bringing the partnership into Court . . . ." (R. B. 17). If Querbes and Coast Oil Company are made parties as set forth in the alternative demand, then the want of consent is automatically supplied and any action thereafter will be binding on Coast, Querbes, and the partnership.

CONCLUSION

This suit involves a demand by petitioner for damages to himself in excess of $1,364,000.00, or, alternatively, to the partnership in excess of $4,000,000.00 (R. 8). At the outset, petitioner has been denied his day in court by the maintenance of technical objections of the respondents dealing with his right to bring any suit arising out of the cause of action because petitioner's partner, Justin R. Querbes, has been unwilling to join in the suit for reasons of his own. The respondents have taken the position, sustained by the courts below, that if Querbes will not voluntarily become a plaintiff, then petitioner's only remedy is to dissolve the partnership before bringing this suit. This would, of course, damage the petitioner even further than he has already been injured and the consequent delay could possibly bar the petitioner from proving some of his most substantial injuries on the basis of prescription or limitation. It is also likely that even though the partnership were wound up, Coast would still be confronted with an objection to his bringing suit. If Coast does not have

sufficient funds to buy out Querbes, then these defendants will still state that the claim is one belonging to the partnership and must be asserted through it.

The precedent established in this case by the court below, if allowed to stand, will not only sanction serious loss to the petitioner but an incorrect solution of three important federal questions will lay as a stumbling block to litigants in diverse situations. Anti-trust litigation and the protection of the rights of small business is becoming increasingly important.[3] The Federal Rules of Civil Procedure are applied daily throughout the federal system, and their correct and uniform interpretation is of far-reaching importance. Rules 17(b) and 19(a) are frequently injected in cases arising under the Fair Labor Standards Act, the National Labor Relations Act, the Labor Management Citations Act, the War Labor Disputes Act, the Patent Laws, the Price Control Statutes, and actions involving constitutional rights as well as anti-trust litigation. In all of these situations, the position of a partner in a suit of this type is uncertain and a definite decision by this court is urgently needed. Although this reply brief has been concerned with refuting certain arguments of the respondents, based, it is said, on Louisiana law, the determination of the issues in this case is essentially a matter of universal federal jurisprudence.

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3. Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit, 61 Yale L. J. 1010.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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